No.

Supreme Court, U.S.
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In The
Supreme Court of the United States
October Term, 1989

CSX TRANSPORTATION, INC.,

Petitioner,

v.

BROTHERHOOD OF RAILWAY CARMEN, DIVISION OF TRANSPORTATION-COMMUNICATIONS INTERNATIONAL UNION, INTERSTATE COMMERCE COMMISSION, AND UNITED STATES OF AMERICA,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTION PRESENTED

Does § 11341(a) of the Interstate Commerce Act empower the Interstate Commerce Commission to override a provision of a collective bargaining agreement where necessary to do so in order to prevent a rail consolidation found by the Commission to be in the public interest from being obstructed by such agreement?

LIST OF PARTIES AND RULE 28.1 LIST

The parties before the Court of Appeals and this Court are all listed in the caption.[1]

CSX Transportation, Inc. ("CSXT") is a wholly-owned subsidiary of CSX Corporation ("CSX"). The subsidiaries and affiliates of CSXT or CSX, other than those wholly owned by them, are:

The Akron Union Passenger Depot Company;
Allegheny and Western Railway Company;
Augusta and Summerville Railroad Company;
The Baltimore and Cumberland Valley Railroad Extension Company;
The Baltimore and Philadelphia Railroad Company;
Beaver Street Tower Company;
Central Transfer Railway and Storage Company;
Chatham Terminal Company;
Clearfield and Mahoning Railway Company;
The Cleveland Terminal & Valley Railroad Company;
Dayton and Michigan Railroad Company;
Dayton and Union Railroad Company;
The Home Avenue Railroad Company;
The Lakefront Dock and Railroad Terminal Company;
Mid-Allegheny Corporation;
North Charleston Terminal Company;
Richmond-Washington Company, which has a subsidiary, RF&P Corporation;
Winston-Salem Southbound Railway Company;
Woodstock & Blockton Railway Company

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[1] In the Court of Appeals, this case was consolidated for oral argument and decision with D.C. Circuit Case No. 88-1694, *American Train Dispatchers' Ass'n* v. *Interstate Commerce Commission and United States of America*. The parties in that case were petitioner, American Train Dispatchers' Association; respondents, Interstate Commerce Commission and the United States of America; and intervenors, Norfolk & Western Railway Co. and Southern Railway Co. CSXT understands that Norfolk & Western and Southern are also filing a petition for a writ of certiorari with respect to the D.C. Circuit decision herein.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

LIST OF PARTIES AND RULE 28.1 LIST ii

OPINIONS BELOW 2

JURISDICTION 2

STATUTES INVOLVED 2

STATEMENT OF THE CASE 3

REASONS FOR GRANTING THE WRIT 8

I. The Court of Appeals' Interpretation of ICA § 11341(a) Conflicts with Decisions of This Court and Other Circuits 8

II. The Court of Appeals' Ruling that Congress Did Not Intend the Immunity from "All Other Law" in ICA § 11341(a) to Include Collective Bargaining Agreements Is Contrary to the Act's Purpose and Legislative History 14

CONCLUSION 19

APPENDIX (Separately Bound)

Opinion and Judgment of the Court of Appeals in *Brotherhood of Railway Carmen* v. *Interstate Commerce Commission*, 880 F.2d 562 (D.C. Cir. 1989) 1a

September 29, 1989, orders of the Court of Appeals denying rehearing 30a

Decision of the Interstate Commerce Commission in *CSX Corporation—Control—Chessie System, Inc. and Seaboard Coast Line Industries, Inc.*, 4 I.C.C.2d 641 (1988) 33a

Page

Opinion and Award, *In the Matter of the Arbitration Between Brotherhood Railway Carmen—Division of BRAC, Organization, and CSX Transportation, Inc. and the Chesapeake and Ohio Railway Company, Carriers,* March 23, 1987 ..... 53a

Transportation Act of 1920, § 407, 41 Stat. 480 ..... 118a

Emergency Railroad Transportation Act of 1933, Title I, § 10(a), 48 Stat. 215, and Title II, § 202, 48 Stat. 217, 219 ..... 118a

Transportation Act of 1940, § 7, 54 Stat. 908-09 ..... 119a

TABLE OF AUTHORITIES

Judicial Decisions: *Page*

Addyston Pipe & Steel Co. v. *United States*, 175 U.S. 211 (1899) 9

Altman v. *Central of Georgia Ry Co.*, 488 F.2d 1302 (D.C. Cir. 1973) 14

American Airlines v. *C.A.B.*, 445 F.2d 891 (2d Cir. 1971), *cert. denied*, 404 U.S. 1015 (1972) 12

American Train Dispatchers' Ass'n v. *I.C.C.*, No. 88-1694 (D.C. Cir.) ii

Andrews v. *Louisville & N. R. Co.*, 406 U.S. 320 (1972) 13

Brotherhood of Locomotive Engineers v. *Boston & Maine Corp.*, 788 F.2d 794 (1st Cir.), *cert. denied*, 479 U.S. 829 (1986) 12

Brotherhood of Locomotive Engineers v. *Chicago & N.W. Ry Co.*, 314 F.2d 424 (8th Cir.), *cert. denied*, 375 U.S. 819 (1963) 11, 17

Brotherhood of Locomotive Engineers v. *I.C.C.*, 761 F.2d 714 (D.C. Cir. 1985), *vacated*, 482 U.S. 270 (1987) 10

Brotherhood of Locomotive Engineers v. *I.C.C.*, 885 F.2d 446 (8th Cir. 1989) 12

Bundy v. *Penn Central Co.*, 455 F.2d 277 (6th Cir. 1972) 12

Burlington Northern, Inc. v. *American Ry Supervisors Ass'n*, 503 F.2d 58 (7th Cir. 1974), *cert. denied*, 421 U.S. 975 (1975) 11

Burlington Northern R.R. v. *United Transportation Union*, 848 F.2d 856 (8th Cir.), *cert. denied sub nom. Interstate Commerce Commission* v. *United Transportation Union*, 109 S.Ct. 499 (1988) 12

California v. *Taylor*, 353 U.S. 553 (1957) 13

City of Palestine, Texas v. *United States*, 559 F.2d 408 (5th Cir. 1977), cert. denied, 435 U.S. 950 (1978) 14

Page

Colorado v. *United States*, 271 U.S. 153 (1926) 9

Connolly v. *Pension Benefit Guaranty Corp.*, 475 U.S. 211 (1986) 9

County of Marin v. *United States*, 356 U.S. 412 (1958) 8

Detroit & Toledo Shore Line R.R. v. *United Transportation Union*, 396 U.S. 142 (1969) 13

International Ass'n of Machinists v. *Central Airlines, Inc.*, 372 U.S. 682 (1963) 13

International Ass'n of Machinists v. *Northeast Airlines, Inc.*, 473 F.2d 549 (1st Cir.), *cert. denied*, 409 U.S. 845 (1972) 12

International Ass'n of Machinists v. *Northeast Airlines, Inc.*, 536 F.2d 975 (1st Cir.), *cert. denied*, 429 U.S. 961 (1976) 12

Interstate Commerce Commission v. *Brotherhood of Locomotive Engineers*, 482 U.S. 270 (1987) 10, 18

Kent v. *C.A.B.*, 204 F.2d 263 (2d Cir.), *cert. denied*, 346 U.S. 826 (1953) 11, 12

Kesinger v. *Universal Airlines, Inc.*, 474 F.2d 1127 (6th Cir. 1973) 12

Missouri Pacific R. Co. v. *United Transportation Union*, 782 F.2d 107 (8th Cir. 1986), *cert. denied*, 482 U.S. 927 (1987) 12

Nemitz v. *Norfolk & W. Ry Co.*, 436 F.2d 841 (6th Cir.), *aff'd on other grounds*, 404 U.S. 37 (1971) 11

New York v. *United States*, 257 U.S. 591 (1922) 9

New York Dock Ry v. *United States*, 609 F.2d 83 (2d Cir. 1979) 4

Norman v. *Baltimore & O. R.R. Co.*, 294 U.S. 240 (1935) 9

Pittsburgh & Lake Erie R.R. Co. v. *Railway Labor Executives' Ass'n*, 109 S.Ct. 2584 (1989) 18

Page

Railway Labor Executives' Ass'n v. *Guilford Transportation Industries, Inc.*, 667 F.Supp. 29 (D. Me. 1987), *aff'd per curiam*, 843 F.2d 1383 (1st Cir. 1988), *cert. denied*, 109 S.Ct. 3213 (1989) 12

Railway Labor Executives' Ass'n v. *I.C.C.*, 883 F.2d 1079 (D.C. Cir. 1989) 12

Railway Labor Executives' Ass'n v. *United States*, 339 U.S. 142 (1950) 17, 18

Schwabacher v. *United States*, 334 U.S. 182 (1948) 8, 9

Texas v. *United States*, 292 U.S. 522 (1934) 9, 15, 17

United States v. *Lowden*, 308 U.S. 225 (1939) 8, 9, 10

United Transportation Union v. *Norfolk & Western Ry Co.*, 332 F.Supp. 1170 (N.D. Ohio 1971) 12

Interstate Commerce Commission Decisions:

Brandywine Valley R.R. Co.—Purchase—CSX Transportation, Inc., Lines in Florida, 5 I.C.C.2d 764 (1989) 12

CSX Corporation—Control—Chessie System, Inc. and Seaboard Coast Line Industries, Inc., 363 I.C.C. 521 (1980) 3

Gulf, Mobile & Ohio R. Co.—Abandonment, 282 I.C.C. 311 (1952) 14

New York Dock Ry—Control—Brooklyn Eastern Dist. Term., 360 I.C.C. 60 (1979), *aff'd sub nom. New York Dock Ry* v. *United States*, 609 F.2d 83 (2d Cir. 1979) 4

Southern Ry Co.—Control—Central of Georgia Ry Co., 331 I.C.C. 151 (1967) 15

Page

Statutes and Rules:

Emergency Railroad Transportation Act of 1933, 48 Stat.

211 16

Title I 16, 17, 18

Title I, § 10(a), 48 Stat. 215 16

Title II 3, 17

Title II, § 202, 48 Stat. 219 16

Interstate Commerce Act

§ 5 17

§ 5(8) 15

§ 5(11) 18

§ 5(15) 16, 17

§ 10901, 49 U.S.C. §10901 18

§ 11341(a), 49 U.S.C. § 11341(a) ..... *passim*

§ 11343(a), 49 U.S.C. § 11343(a) 3

§ 11344(b)(1)(D), 49 U.S.C. § 11344(b)(1)(D) 3

§ 11344(c), 49 U.S.C. § 11344(c) 4

§ 11347, 49 U.S.C. § 11347 ..... 4, 7, 12

Pub. L. No. 95-473, § 3(a), 92 Stat. 1466 18

Railway Labor Act, 45 U.S.C. § 151 *et seq* ..... *passim*

Transportation Act of 1920, § 407, 41 Stat. 480 ..... 3, 15

Transportation Act of 1940, § 7, 54 Stat. 908-09 ..... 3, 18

28 U.S.C. § 1254(1) 2

28 U.S.C. § 2321(a) 7

28 U.S.C. § 2342(5) 7

Page

Supreme Court Rule 20.4 2

Other Authorities:

84 Cong. Rec. (1939) 18

Hearings on H.R. 2531 Before the House Comm. on Interstate and Foreign Commerce, 76th Cong., 1st Sess (1939) 17

Hearings on H.R. 5641 Before the House Comm. on Interstate and Foreign Commerce, 70th Cong., 1st Sess. (1928) 16

Hearings on S.J. Res. 161 Before the Senate Comm. on Interstate Commerce, 71st Cong., 2d Sess. (1930) 16

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioner CSX Transportation, Inc. ("CSXT") respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the District of Columbia Circuit, entered in the above-entitled proceeding on July 25, 1989.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit is reported at 880 F.2d 562 and is reprinted in the separately bound Appendix at 1a.

The June 8, 1988, decision of the Interstate Commerce Commission, which was reviewed by the Court of Appeals, is reported at 4 I.C.C.2d 641 and is reprinted in the Appendix at 33a.

The March 23, 1987, arbitration decision, which was reviewed by the Interstate Commerce Commission, has not been reported. It is reprinted in the Appendix at 53a.

JURISDICTION

The United States Court of Appeals for the District of Columbia Circuit entered its judgment on July 25, 1989. App. 29a. CSXT timely filed a petition for rehearing, which was denied by the Court of Appeals by order dated September 29, 1989. App. 30a.[1] The jurisdiction of this Court to review the judgment of the Court of Appeals is invoked under 28 U.S.C. § 1254(1). This petition has been filed within the time period provided by Supreme Court Rule 20.4.

STATUTES INVOLVED

Interstate Commerce Act ("ICA"), § 11341(a), 49 U.S.C. § 11341(a) (excerpt):

> The authority of the Interstate Commerce Commission under this subchapter is exclusive. A carrier or corporation participating in or resulting from a transaction approved by or exempted by the Commission under this sub-chapter may carry out the transaction, own and operate property, and exercise control or franchises acquired through the transaction without the approval of a State authority. A carrier, corporation, or person participating in that approved or exempted transaction is exempt from the antitrust laws and from all other law, including State and municipal law, as necessary to let that person carry out the transaction, hold, maintain, and operate property, and exercise control or franchises acquired through the transaction.

[1] A petition for rehearing was also filed by Norfolk & Western Railway Company and Southern Railway Company, intervenors in D.C. Cir. No. 88-1694. *See* ii n.1, *supra*. This petition was denied by the Court of Appeals on September 29, 1989. App. 30a. The Interstate Commerce Commission also filed a petition for rehearing, in which it asked the Court of Appeals to defer any ruling thereon until after the Commission's decision on remand. By order dated September 29, 1989, the court remanded the record in this matter to the Commission and ordered that consideration of the Commission's petition be deferred pending release of the ICC's decision on remand. App. 32a.

Section 11341(a)'s predecessors, found in § 407 of the Transportation Act of 1920, 41 Stat. 480; Title II, § 202 of the Emergency Railroad Transportation Act of 1933, 48 Stat. 219; and § 7 of the Transportation Act of 1940, 54 Stat. 908-09, are located in the Appendix at 118a-120a.

STATEMENT OF THE CASE

I. The Creation of the Consolidated CSX Rail System

In 1980, the ICC approved, pursuant to 49 U.S.C. § 11343(a), the application of CSX Corporation to control the rail subsidiaries of Chessie System, Inc. and Seaboard Coast Line Industries, Inc.[2] *CSX Corporation–Control–Chessie System, Inc. and Seaboard Coast Line Industries, Inc.*, 363 I.C.C. 521 (1980) ("*CSX–Control*"). After weighing all of the evidence before it, including evidence and arguments submitted by rail labor organizations (*see* 49 U.S.C. § 11344(b)(1)(D)), the Commission concluded that substantial economies would result from the creation of this consolidated

[2] Among the railroads controlled by Chessie was the Chesapeake and Ohio Railway Company ("C&O"). Seaboard Coast Line Industries controlled the Seaboard Coast Line Railroad Company ("SCL") and the Louisville and Nashville Railroad Company ("L&N"), *inter alia*. On December 29, 1982, SCL merged with L&N to form Seaboard System Railroad, Inc. On July 1, 1986, Seaboard System Railroad changed its name to CSX Transportation, Inc. ("CSXT"), Petitioner herein. C&O subsequently merged into CSXT in 1987.

rail system and, accordingly, that the proposal was consistent with the public interest. 49 U.S.C. § 11344(c). 363 I.C.C. at 597-98. The Commission conditioned its approval with its standard *New York Dock* labor conditions,[3] which comply with the requirements of 49 U.S.C. § 11347. *Id.* at 589.[4]

Following the Commission's decision in *CSX–Control*, the rail carriers controlled by CSX Corporation embarked on a series of actions – facility consolidations and operational coordinations – designed to realize the economies and efficiencies the ICC had found to be in the public interest.

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[3] *New York Dock Ry–Control–Brooklyn Eastern Dist. Term.*, 360 I.C.C. 60 (1979), *aff'd sub nom. New York Dock Ry* v. *United States*, 609 F.2d 83 (2d Cir. 1979).

[4] The *New York Dock* Conditions provide employees affected by a rail consolidation with up to six years of income protection as well as reimbursement for moving costs and losses from the sale of a home. Art. I, §§ 5, 6, 9, 12.

The conditions also contain an expedited bargaining/arbitration procedure for the establishment of a so-called "implementing agreement" between the carriers and rail unions representing employees affected by an ICC-approved consolidation. An implementing agreement prescribes the method for selecting and assigning employees in order to accomplish operational changes that result from such a consolidation. Under Art. I, § 4(a) of *New York Dock*, the carrier must give the employees and their unions at least 90 days written notice of an operational change that may result in the rearrangement of forces. If the parties are unable to achieve an implementing agreement "provid[ing] for the selection of forces from all employees involved on a basis accepted as appropriate for application in the particular case" after bargaining for 30 days, either party may submit the dispute for a binding determination by a neutral arbitrator. The arbitrator must be selected within five days, and the arbitration hearing must commence within 20 days thereafter. The arbitrator must render his decision within 30 days of the hearing. The carrier may not implement the proposed operational change until an agreement has been reached through collective bargaining or prescribed through arbitration. Art. I, § 4(b).

The *New York Dock* Conditions have been described as "significantly more protective of the interests of railway labor than any previously imposed single set of employee protective conditions." *New York Dock Ry*, 609 F.2d at 91.

II. The Waycross-Raceland Shop Consolidation and the LaRocco Arbitration Award

On August 29, 1986, CSXT and C&O gave the notice required under *New York Dock* Art. I, § 4(a) of their intent to close the CSXT freight car heavy repair shop in Waycross, Georgia, and to consolidate that work with that being performed in the counterpart C&O shop at Raceland, Kentucky, as a further part of the overall consolidation approved in *CSX–Control*. When bargaining with the Brotherhood of Railway Carmen ("BRC") over the terms of an implementing agreement to govern the shop consolidation was unsuccessful, both the railroads and BRC invoked arbitration under *New York Dock* Art. I, § 4(a).

Even though BRC had initially sought arbitration of the dispute, the union argued to the three-man arbitration committee, headed by Neutral Referee John LaRocco, that the committee lacked authority to impose an implementing agreement moving carmen and their work from the BRC agreement with the SCL at Waycross to the BRC agreement with the C&O at Raceland. BRC asserted that the carriers first had to exhaust the bargaining procedures prescribed in the Railway Labor Act ("RLA"), 45 U.S.C. § 151 *et seq*. In addition, BRC claimed that certain Waycross carmen who were covered by the so-called Orange Book Agreement[5] and the work they perform could not under the terms of that agreement be moved beyond the boundaries of the former SCL system.

The arbitration committee ruled that the Commission where necessary may supersede the bargaining agreement. App. 80a. Accordingly, the committee concluded that, as the Commission's surrogate, it had the authority to adopt an implementing agreement providing for the movement of both the work and

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[5] The Orange Book Agreement was entered into effective August 1, 1966, in connection with the July 1, 1967, merger of the Seaboard Air Line Railroad Company ("SAL") and the Atlantic Coast Line Railroad Company ("ACL") to form SCL. The Orange Book provides income protection to individuals employed by either SAL or ACL on or before the July 1, 1967, merger for the remainder of their working lives.

employees who perform it from Waycross to Raceland, notwithstanding any inconsistent provisions in existing collective bargaining agreements. The committee adopted an implementing agreement transferring the car repair work to Raceland and overriding a provision of the Orange Book that it found precluded that work transfer. However, the Committee refused to override a provision of the Orange Book agreement that it found precluded Orange Book-protected employees from being transferred from Waycross to Raceland. App. 85a.[6]

III. The Commission's Ruling on Appeal

Both BRC and CSXT appealed the arbitration award to the Commission. In its June 8, 1988, decision (4 ICC 2d 641; App. 33a), the Commission affirmed the arbitration committee's determination that it had the authority to prescribe an implementing agreement moving both work and employees, notwithstanding BRC's claims that it lacked such authority and that any change in existing agreements and working conditions could be accomplished only through the RLA's bargaining procedures. 4 I.C.C.2d at 649; App. 43a. However, the Commission reversed the award with regard to the arbitration committee's refusal to override the Orange Book provision that the committee found prohibited the transfer of employees outside the former SCL system. The Commission found that this Orange Book provision served as an impediment to the implementation of the rail consolidation it had authorized:

> Once it is determined that a proposed transaction is authorized by the Commission . . . , the carrier is permitted to carry out and fully implement the transaction despite potential impediments in existing agreements upon compliance with the provisions for the protection of the rights of employees contained in *New York Dock* or imposed by the Commission upon the involved transaction.

[6] CSXT and C&O subsequently implemented that portion of their proposed transaction allowed by the arbitration award, transferring the repair work and non-Orange Book-protected employees to Raceland.

4 I.C.C.2d at 650; App. 44a.[7]

IV. The Court of Appeals Decision

BRC sought review of the Commission's decision by the D.C. Circuit under 28 U.S.C. §§ 2321(a) and 2342(5). The court, in a July 25, 1989, opinion, reversed the Commission's decision and remanded the record to the Commission for further proceedings. The Court of Appeals ruled that ICA § 11341(a) did not empower the Commission to override contracts, including collective bargaining agreements.[8] The court based its decision on the fact that the § 11341(a) exemption includes "all other law" but does not specifically refer to "contracts." In addition, the court saw no support for the Commission's interpretation of that section in its language or history, or in the design of the ICA as a whole. 880 F.2d at 567-68; App. 12a-13a. The court remanded the record to the Commission for consideration of whether the Commission's modification of collective bargaining agreement provisions that would stand in the way of approved rail consolidations might be supported by other provisions of the ICA.[9]

[7] Accordingly, the Commission did not consider CSXT's alternate contention that the arbitration committee had misinterpreted the Orange Book as prohibiting the transfer of work and employees outside the former Seaboard system. The Court of Appeals did not address this issue either.

[8] The Court of Appeals erroneously concluded that the Commission's decision deprived Orange Book-protected carmen of their working-lifetime income protection. 880 F.2d at 564; App. 6a. In fact, the Commission clearly explained that it was reversing the arbitration award only "to the extent it holds that CSX may not require transfer of SCL employees as well as work from Waycross to Raceland." 4 I.C.C.2d at 650; App. 44a. Accordingly, Orange Book-protected carmen transferring to Raceland would take their Orange Book income protection with them.

[9] Thus, the Court of Appeals did not decide whether the Commission might possess the authority to prescribe a procedure to modify such agreements as a result of the Commission's obligation to impose labor conditions on its approval of rail consolidations in ICA § 11347, 49 U.S.C. § 11347. 880 F.2d at 573-74; App. 25a-26a. Similarly, the court did not rule on whether a carrier was immune from complying with procedures of the RLA as a result of ICA § 11341(a), preferring to let the Commission reconsider this issue on remand. 880 F.2d at 573; App. 25a.

REASONS FOR GRANTING THE WRIT

This case presents questions of exceptional importance for the railroad industry in that, if not corrected, the decision will thwart the achievement of the national transportation policy of fostering and encouraging rail carrier consolidations.[10]

The Court of Appeals' decision is in conflict with at least two decisions of this Court: *Schwabacher* v. *United States*, 334 U.S. 182 (1948), and *United States* v. *Lowden*, 308 U.S. 225 (1939). Furthermore, it is in conflict with decisions from the Courts of Appeals of at least four circuits. These decisions, virtually ignored by the court below, have consistently recognized that Congress intended the ICA to take precedence over all obstacles arising under both state and federal "law", including contracts.

In addition, the Court of Appeals' interpretation of § 11341(a) is manifestly contrary to Congress's expressed intent. Congress has demonstrated that it fully intended and understood that collective bargaining agreements are within the scope of the ICA immunity provisions.

I. The Court of Appeals' Interpretation of ICA § 11341(a) Conflicts with Decisions of this Court and Other Circuits

The Court of Appeals reached its unprecedented interpretation of ICA § 11341(a) through a most simplistic analysis. The court noted that the word "contract" is not literally found in that section, and it located no legislative history that it believed demonstrated that Congress had intended to include contracts within the reach of that provision. *But see* Section II, *infra*. On this basis, it declared that contracts, including collective bargaining agreements, are outside the immunity provision's scope. The Court of Appeals' decision is contrary to the decisions of this Court and other Courts of Appeals that have uniformly

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[10] *See United States* v. *Lowden*, 308 U.S. 225, 232 (1939) ("As a result of the enactment of the Transportation Act of 1920, consolidation of the railroads of the country, in the interest of economy and efficiency, became an established national policy . . . . "); *County of Marin* v. *United States*, 356 U.S. 412, 416 (1958) (recognizing Congressional purpose "to facilitate merger and consolidation in the national transportation system" behind revisions to section 5 of the ICA in the Transportation Act of 1940).

ruled that Congress in fact intended that private contracts, and collective bargaining agreements in particular, not stand in the way of the implementation of rail consolidations found to be in the public interest.

A. The panel cited no precedent for its blanket conclusion that § 11341(a) does not give the ICC authority to override contracts even where necessary to implement an approved rail consolidation.[11] This Court held directly to the contrary in *Schwabacher* v. *United States*, 334 U.S. 182, 188, 199 (1948), when it concluded that the ICC had authority to supersede "contract rights under Michigan law" flowing from a rail corporation's charter. This Court observed that, as a result of the ICA's immunity provisions, "[i]n matters within [the ICA's] scope it is the supreme law of the land." 334 U.S. at 198. *See also Texas* v. *United States*, 292 U.S. 522, 531 (1934) ("Even explicit charter provisions must yield to the paramount regulatory power of the Congress."); *Colorado* v. *United States*, 271 U.S. 153, 165 (1926) *(semble)*; *New York* v. *United States*, 257 U.S. 591, 601 (1922) *(semble)*.[12]

Moreover, this Court recognized in *United States* v. *Lowden*, *supra*, that ICC-approved rail consolidations will inevitably result in major changes in the working conditions of rail employees, including changes in conditions, such as seniority

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[11] The Court of Appeals reasoned, "Under the ICC's reading, it could set to naught, in order to facilitate a merger, a carrier's solemn undertaking, in a bond indenture or a bank loan, to refrain from entering into any such transaction without the consent of its creditors. . . . We do not think it likely that Congress would grant the ICC a power with so much potential to destabilize the railroad industry . . . . " 880 F.2d at 567-68; App. 13a.

[12] In the court below BRC claimed that the ICC's actions amounted to a "taking" of its members' property in violation of the Fifth Amendment. The Court of Appeals did not reach this issue. 880 F.2d at 574; App. 26a. This Court has long recognized that contracts that deal with a subject matter appropriately regulated by the federal government under the commerce power may be modified without violating the Fifth Amendment. *See, e.g., Connolly* v. *Pension Benefit Guaranty Corp.*, 475 U.S. 211, 225 (1986); *Norman* v. *Baltimore & O. R.R. Co.*, 294 U.S. 240, 307-11 (1935); *New York* v. *United States*, 257 U.S. at 601; *Addyston Pipe & Steel Co.* v. *United States*, 175 U.S. 211, 230 (1899).

rights,embodied in collective bargaining agreements. "Not only must unification result in wholesale dismissals and extensive transfers, involving expense to transferred employees, but in the loss of seniority rights which, by common practice of the railroads are restricted in their operation to those members of groups who are employed at specified points or divisions." 308 U.S. at 233. This Court ruled in *Lowden* that the ICC could properly impose labor protective conditions to ameliorate the effects of such changes to collective bargaining agreements on employees.

In addition, four members of this Court have also declared that an ICC consolidation order supersedes the RLA and its collective bargaining agreement terms as a result of § 11341(a). In *Interstate Commerce Commission* v. *Brotherhood of Locomotive Engineers,* 482 U.S. 270 (1987), the union argued that its members had rights under the RLA *and their collective bargaining agreements* to perform certain work and that those rights were violated by an ICC trackage rights order that approved other labor arrangements. 482 U.S. at 295. The railroads responded that they were immune from complying with these agreement terms and the RLA as a result of § 11341(a). A panel of the D.C. Circuit ruled that the Commission was required to make explicit findings of "necessity" before the immunity provision would apply. *Brotherhood of Locomotive Engineers* v. *ICC,* 761 F.2d 714, 723 (D.C. Cir. 1985).[13]

The majority of this Court did not reach this issue, ruling that the D.C. Circuit had lacked jurisdiction over the union's petition for administrative review. 482 U.S. at 277-87. Justice Stevens, in a concurring opinion joined by Justices Brennan, Marshall, and Blackmun, however, would have reached the merits and would have reversed the D.C. Circuit on the grounds that the immunity provisions of the ICA are self-executing and do not depend on any explicit "necessity" findings. 482 U.S. at 298. Significantly, these justices did not even intimate that

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[13] In so ruling, the D.C. Circuit implicitly held that the ICC had the statutory authority to immunize rail carriers from compliance with the RLA and established rights arising out of collective bargaining agreements, so long as it made express findings of the "necessity" for such immunity.

§ 11341(a) does not supersede the RLA or obligations arising out of collective bargaining agreements in the rail industry.

B. Prior to the Court of Appeals' decision herein, at least four Courts of Appeals have ruled that an ICC-authorized consolidation or merger supersedes inconsistent terms in collective bargaining agreements and the RLA, from which they originate, as a result of the ICA immunity provisions in § 11341(a). In the seminal decision in *Brotherhood of Locomotive Engineers* v. *Chicago & N.W. Ry Co.,* 314 F.2d 424 (8th Cir.), *cert. denied,* 375 U.S. 819 (1963), the Eighth Circuit rejected arguments that a carrier's rearrangement of forces after a merger unilaterally and unlawfully changed agreements, concluding, "[T]he ICC['s] power to authorize mergers would be completely ineffective if authority to adjust work realignments through fair compensation did not exist." 314 F.2d at 430. The Eighth Circuit observed, " 'A private contract must yield to the paramount power of the [Commission] to perform its duties under the statute creating it to approve mergers . . . . ' " 314 F.2d at 430, *quoting Kent* v. *Civil Aeronautics Board,* 204 F.2d 263, 266 (2d Cir.), *cert. denied,* 346 U.S. 826 (1953).

The Seventh Circuit has also ruled that the ICC in connection with a rail merger could supersede the RLA and its bargaining agreements as a result of the ICA's immunity provisions. *Burlington Northern, Inc.* v. *American Ry Supervisors Ass'n,* 503 F.2d 58, 62-63 (7th Cir. 1974), *cert. denied,* 421 U.S. 975 (1975) (Merger protection agreement found not to be inconsistent with RLA but "if it were its provisions would be controlling."). The Sixth Circuit similarly has acknowledged the necessity for supplanting bargaining agreements and the RLA in an ICC-authorized transaction in *Nemitz* v. *Norfolk & W. Ry Co.,* 436 F.2d 841, 845 (6th Cir.), *aff'd on other grounds,* 404 U.S. 37 (1971):

> The authority vested in the I.C.C. to effectuate proposed mergers would be rendered ineffective if authority to adjust work realignments through fair compensation did not exist. Since, under the Railway Labor Act, employees cannot be compelled to accept or arbitrate new working rules or conditions, the application of the Railway Labor Act . . . , like the Harrington Amendment, would threaten to prevent many consolidations, and, therefore, should not be applied.

See also Railway Labor Executives' Ass'n v. *Guilford Transportation Industries, Inc.*, 667 F.Supp. 29, 35 (D. Me. 1987), *aff'd per curiam*, 843 F.2d 1383 (1st Cir. 1988), *cert. denied*, 109 S.Ct. 3213 (1989); *Brotherhood of Locomotive Engineers* v. *Boston & Maine Corp.*, 788 F.2d 794, 800 (1st Cir.), *cert. denied*, 479 U.S. 829 (1986) ("ICC has the power to approve a transaction and exempt its participants from legal obstacles that would impede its fruition.").[14]

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[14] *See also Burlington Northern R. Co.* v. *United Transportation Union*, 848 F.2d 856, 863 (8th Cir.), *cert. denied sub nom. Interstate Commerce Commission* v. *United Transportation Union*, 109 S.Ct. 499 (1988) ("When the ICA provides a specific exemption from all other law and mandates inescapable employee protective conditions under provisions such as 49 U.S.C. §§ 11341(a), 11347, it effectively supersedes . . . the RLA . . . . "); *Missouri Pacific R. Co.* v *United Transportation Union*, 782 F.2d 107, 111 (8th Cir. 1986), *cert. denied*, 482 U.S. 927 (1987) ("MOPAC is exempted under § 11341(a) of the Interstate Commerce Act . . . from the requirements of the Railway Labor Act (RLA) with respect to major disputes."); *Bundy* v. *Penn Central Co.*, 455 F.2d 227, 279-80 (6th Cir. 1972); *United Transportation Union* v. *Norfolk & Western Ry Co.*, 332 F.Supp. 1170, 1174 (N.D. Ohio 1971).

The courts have similarly ruled that the Civil Aeronautics Board in airline mergers could supersede the RLA and collective bargaining agreement provisions that would interfere with the merger, even in the absence of express statutory language comparable to § 11341(a). *See International Ass'n of Machinists* v. *Northeast Airlines, Inc.*, 536 F.2d 975, 977 (1st Cir.), *cert. denied*, 429 U.S. 961 (1976); *International Ass'n of Machinists* v. *Northeast Airlines, Inc.*, 473 F.2d 549, 559-60 (1st Cir.), *cert. denied*, 409 U.S. 845 (1972); *Kesinger* v. *Universal Airlines, Inc.*, 474 F.2d 1127, 1131-32 (6th Cir. 1973); *American Airlines* v. *CAB*, 445 F.2d 891, 896 (2d Cir. 1971), *cert. denied*, 404 U.S. 1015 (1972); *Kent* v. *CAB*, 204 F.2d 263, 265-66 (2d Cir.), *cert. denied*, 346 U.S. 826 (1953).

Subsequent to the Court of Appeals decision herein, another panel of the D.C. Circuit and an Eighth Circuit panel, both in dicta, have cited the holding of the instant case without further analysis. *See Railway Labor Executives' Ass'n* v. *I.C.C.*, 883 F.2d 1079 (D.C. Cir. 1989); *Brotherhood of Locomotive Engineers* v. *I.C.C.*, 885 F.2d 446 (8th Cir. 1989). In addition, in *Brandywine Valley R.R. Co.—Purchase—CSX Transportation, Inc., Lines in Florida*, 5 I.C.C.2d 764, 772 n.5 (1989), the ICC stated that it "do[es] not dispute the limited holding" of the Court of Appeals herein. CSXT submits that, for the same reasons that the Court of Appeals erred, the Commission has erred in apparently acquiescing in this holding.

Furthermore, the Court of Appeals committed a fundamental and unprecedented error of analysis when it considered the impact of § 11341(a) on collective bargaining agreements apart from the effects of that section on the RLA. In none of the decisions cited above did a Court of Appeals create such an artificial dichotomy between the RLA and collective bargaining agreements existing thereunder. Rail collective bargaining agreements are creatures of, and solely enforceable under, the RLA. *See, e.g., Detroit & Toledo Shore Line R.Co.* v. *United Transportation Union*, 396 U.S. 143, 156 (1969) (RLA § 2 Seventh "operates to give legal and binding effect to collective agreements"); *Andrews* v. *Louisville & N. R. Co.*, 406 U.S. 320, 323 (1972) (an RLA agreement is "a federal contract and ... therefore governed and enforceable by federal law, in the federal courts," *quoting International Ass'n of Machinists* v. *Central Airlines, Inc.*, 372 U.S. 682, 692 (1963)). Indeed, as creatures of the RLA – a federal law – rail collective bargaining agreements supersede inconsistent provisions of state law under the Supremacy Clause. *See California* v. *Taylor*, 353 U.S. 553, 561 (1957). Each of the Courts of Appeals that has addressed this question, with the sole exception of the court below, has recognized this fundamental truth and has ruled that the ICC has the authority under § 11341(a) to override both collective bargaining agreements that impede approved rail consolidations and the RLA.

Finally, the Courts of Appeals have similarly ruled that the Commission can supersede contracts other than collective bargaining agreements, following this Court's decision in *Schwabacher*. *See Altman* v. *Central of Georgia Ry Co.*, 488 F.2d 1302, 1305-07 (D.C. Cir. 1973) (claims for payment of dividends allegedly due under railroad charter and bylaws barred by ICC decision as a result of ICA immunity provision). *Cf. City of Palestine, Texas* v. *United States*, 559 F.2d 408, 414 (5th Cir. 1977), *cert. denied*, 435 U.S. 950 (1978) (assuming that Congress gave ICC power to abrogate contracts).[15]

Accordingly, Petitioner CSXT submits that a writ of certiorari should issue because of the conflict between the decision herein and the aforementioned decisions of this Court and other Courts of Appeals.

II. The Court of Appeals' Ruling that Congress Did Not Intend the Immunity from "All Other Law" in ICA § 11341(a) to Include Collective Bargaining Agreements Is Contrary to the Act's Purpose and Legislative History

The legislative history of § 11341(a) clearly demonstrates that Congress intended the immunity provisions of the ICA to apply to impediments arising out of collective bargaining agreements.The Court of Appeals limited its analysis solely to the legislative history of the Transportation Act of 1920, in which

[15] The Court of Appeals also misconstrued the ICC's decision in *Gulf, Mobile & Ohio R. Co.–Abandonment*, 282 I.C.C. 311 (1952), as representing the ICC's view that the ICA does not authorize the override of private contractual rights. 880 F.2d at 567; App. 13a. That case involved an abandonment, to which the immunity provisions found in the rail consolidation chapter of the ICA do not apply. In fact, the ICC explained in *Gulf, Mobile* that it could set aside "vested rights of other parties . . . upon a clear grant of statutory authority similar to that contained in Section 5(11) [now § 1134(a)]." 282 I.C.C. at 335.

§ 11341(a) originated,[16] and the 1926 RLA, [17] and professed to find no relevant later indications that Congress intended to bring collective bargaining agreements within the reach of § 11341(a). 880 F.2d at 567, 570; App. 13a, 18a-19a. In addition to misreading the limited legislative history it did consider, the Court of Appeals ignored other relevant history that demonstrates that Congress understood and intended that the ICA immunizes consolidating rail carriers from collective bargaining agreement provisions to

[16] In sweeping language, Congress provided in 1920 in ICA § 5(8) that ICC orders approving carrier consolidations and unifications superseded all other federal and state statutes "and all other restraints or prohibitions by law". ICA § 5(8), as added by Transportation Act of 1920, § 407, 41 Stat. 480. App. 118a.

It is apparent from the section's text that a significant Congressional concern was to relieve consolidating rail carriers from the effects of the Clayton Act and inconsistent provisions of local state transportation statutes. However, had Congress intended to limit the reach of the immunity language to encompass only the antitrust laws and state regulatory statutes, it clearly could have done so without adding the general provision encompassing "all other restraints or prohibitions by law, State or Federal." *See Texas* v. *United States*, 292 U.S. at 534-35 (immunity not limited to antitrust statutes; scope of immunity must be measured by Congress' purpose: "the promotion of economy and efficiency in interstate transportation by the removal of the burdens of excessive expenditure").

[17] There is no evidence in the legislative history of the RLA that Congress intended that statute to be an exception to the general immunity provisions of the ICA, enacted just six years earlier. As the Commission itself remarked some years later in *Southern Ry Co.–Control–Central of Georgia Ry Co.*, 331 I.C.C. 151, 154 (1967), Congress did not intend the RLA to occupy the field with respect to rail consolidations. "No protection was provided [in the RLA] for employees adversely affected by railroad consolidations."

Indeed, Congress expressly provided in § 7 Third (f) of the RLA, 45 U.S.C. § 157 Third (f), that a certified copy of any arbitration award that resolves a bargaining or "major" dispute under the RLA must be filed with the ICC and that "such award shall not be construed to diminish or extinguish any of the powers or duties of the Interstate Commerce Commission, under the Interstate Commerce Act, as amended." Thus, Congress' intention that the procedures and obligations arising out of the RLA should be subservient to the powers of the Commission under the ICA, extensively revised by Congress only six years earlier in the Transportation Act of 1920, cannot have been more plainly expressed.

the extent necessary to carry out ICC-authorized mergers and consolidations.

Rail labor first sought the passage of amendments to the ICA in both 1928 and 1930 that would have required the ICC, as a condition of a merger authorization, to preserve existing collective bargaining agreement provisions.[18] Such amendments would have been wholly unnecessary if carriers were not already permitted under the ICA to rearrange forces and change working conditions notwithstanding impediments in such agreements.

Congress' intent that collective bargaining agreements not be exempted from the ICA immunity provisions was most clearly demonstrated in connection with its enactment of the Emergency Railroad Transportation Act of 1933 ("ERTA"). 48 Stat. 211. As part of the temporary, emergency measures located in Title I of ERTA, Congress passed an immunity provision, modeled after that in the Transportation Act of 1920, that applied to rail carriers that were consolidating under the emergency authority given in ERTA to the new office of Federal Railroad Coordinator. ERTA Title I, § 10(a); 48 Stat. 215; App. –. However, the temporary immunity provision in Title I of ERTA expressly excepted from its scope "any of the requirements of the Railway Labor Act or the duties and obligations imposed thereunder *or through contracts entered into in accordance with the provisions of said act.*" App. 118a; emphasis added.

In Title II, § 202 of ERTA Congress amended and reenacted the permanent consolidation provisions of the ICA. The immunity provision was modified and became renumbered ICA § 5(15). 48 Stat. 219; App. 119a. Significantly, however, Congress did not add a proviso excepting collective bargaining agreements from the scope of the ICA's permanent immunity language, in

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[18] *See, e.g., Hearings on H.R. 5641 Before the House Comm. on Interstate and Foreign Commerce*, 70th Cong., 1st Sess., Pts. 1-4, at 336-37 (1928) (statement of Mr. Dougherty, Vice Pres., Brotherhood of Railway Trainmen); *Hearings on S.J. Res. 161 Before the Senate Comm. on Interstate Commerce*, 71st Cong., 2d Sess. 244 (1930) (RLEA proposed ICA amendment to provide, as a condition of ICC approval of a rail consolidation, "[t]hat contractual and legal obligations to . . . employees shall be maintained . . . .").

marked contrast to the temporary immunity provision in Title I.[19] Thus, under the temporary, emergency provisions of ERTA, carrier consolidations resulting from orders of the Federal Railroad Coordinator were subject to compliance with the terms of collective bargaining agreements. Following ERTA's expiration in 1936, however, consolidating rail carriers continued to be relieved of all "restraints or prohibitions by or imposed under authority of law, State or Federal" without any such exception for collective bargaining agreements, as a result of ICA § 5(15), the predecessor of § 11341(a). App. 119a.

In 1940, Congress substantially amended the ICA's merger provisions. *See generally Railway Labor Executives' Ass'n v. United States*, 339 U.S. 142 (1950). At the urging of rail labor, a bill was introduced by Representative Lea that would have amended the ICA's immunity provision to include language identical to that of Title I of ERTA that would have provided an exception for collective bargaining agreements. H.R. 2531, § 209, reprinted in *Hearings on H.R. 2531 Before the House Comm. on Interstate and Foreign Commerce*, 76th Cong., 1st Sess., Pt. 1 at 9 (1939). Representative Harrington subsequently proposed an amendment to the ICA even more favorable to labor that would have prevented the impairment of any collective bargaining agreement terms as well as the layoff or displacement of

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[19] This Court has previously relied upon the differences between the scope of the immunities conferred in Titles I and II of ERTA. In *Texas v. United States, supra*, this Court noted that in § 11 of Title I Congress expressly provided that carriers acting pursuant to the emergency powers of the Federal Coordinator were *not* thereby relieved of "any *contractual* obligation" to maintain offices or shops at any point, but that Title II contained no such exception. As this Court explained, "The insertion of the provision in Title I, with its restricted application, and the omission of a similar provision from Title II, indicate an intentional distinction." 292 U.S. at 534. *See also Railway Labor Executives' Ass'n v. United States*, 339 U.S. at 151 n.13 (noting differences between temporary provisions in Title I of ERTA and permanent amendments to § 5 of ICA found in Title II); *Brotherhood of Locomotive Engineers v. Chicago & N.W. Ry Co.*, 314 F.2d at 432 n.2 (*semble*).

any employees as a result of mergers.[20] Congress rejected both proposals. Instead it reenacted in ICA § 5(11) a broad immunity from "the operation ... of all ... restraints, limitations, and prohibitions of law, Federal, State, or municipal."[21] This provision has now been recodified in § 11341(a).[22]

Thus, except for 1933-36, when Congress temporarily excepted collective bargaining agreements from the reach of the immunity conferred on consolidating carriers in the emergency provisions in Title I of ERTA, Congress has demonstrated its intent that the immunity from "all law" contained § 11341(a) of the ICA permits the supersession of impediments to rail mergers arising out of collective bargaining agreements.[23] The Court of Appeals' decision interprets the immunity provisions now found in § 11341(a) of the ICA in a way that Congress expressly rejected in both 1933 and 1940 and which is totally

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[20] The proposed Harrington Amendment stated:

> Provided, however, that no such transaction shall be approved by the Commission if such transaction will result in unemployment or displacement of employees of the carrier or carriers, *or in the impairment of existing employment rights of said employees.*

84 Cong. Rec. 9882 (1939); emphasis added. As this Court recognized in *Railway Labor Executives' Ass'n*, 339 U.S. at 151, the Harrington Amendment "threatened to prevent all consolidations to which it related."

[21] Section 5(11) of the ICA, as enacted in § 7 of the Transportation Act of 1940, c. 722, 54 Stat. 908-09; App. 119a-120a.

[22] ICA § 5(11) was recodified in 1978 as ICA § 11341 (a). Pub. L. No. 95-473, §3(a), 92 Stat. 1466. As Justice Stevens noted in *Interstate Commerce Commission* v. *Brotherhood of Locomotive Engineers*, 482 U.S. at 299 n. 12 (1987) (Stevens, J. concurring), the change in language as a result of the 1978 codification caused no substantive change.

[23] Nothing in this Court's decision last term in *Pittsburgh & Lake Erie R.R. Co.* v. *Railway Labor Executives' Ass'n*, 109 S.Ct. 2584 (1989), is to the contrary. The transaction at issue in that case – a sale of rail lines to a new carrier under ICA § 10901 – was not governed by the consolidation provisions of the ICA and, hence, was not encompassed within § 11341(a)'s immunity provisions.

inconsistent with the relevant legislative history. For this further reason, a writ of certiorari should be issued to review that decision.

CONCLUSION

For the reasons set forth herein, Petitioner CSX Transportation, Inc. respectfully submits that its petition for a writ of certiorari should be granted.

Respectfully submitted,

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